

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ANTOLIN ANDREW MARKS,

Plaintiff,

v.

CHARLES Mc BURNEY et al.,

Defendants.

Case No. C07-5007RBL

REPORT AND  
RECOMMENDATION TO  
DENY PLAINTIFF'S  
MOTION FOR DEFAULT

**NOTED FOR:**

**DECEMBER 7, 2007**

This Bivens action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. § 636(b)(1)(B). Before the court is plaintiff's motion /notice of default (Dkt. # 21). Defendants have answered the complaint and filed a counter claim and are not in default at this time (Dkt # 22). Accordingly, the motion should be **DENIED**.

FACTS

This action was commenced on January 4, 2007, when plaintiff filed a motion to proceed *in forma pauperis* and a proposed complaint (Dkt. # 1). On January 29, 2007, the court ordered service (Dkt # 6). Over the next several months, counsel appeared on behalf of defendants but no answer was filed. On November 6, 2007, plaintiff moved for default and on November 9, 2007, an answer and counter claim were filed (Dkt # 21 and 22).

## DISCUSSION

As defendants have filed an answer, they are not in default at this time. Default judgments are disfavored by the law and cases should be decided on their merits except in extreme cases. Mendoza v. Wight Vineyard Management, 783 F.2d 941, 945-46 (9th Cir. 1986). The motion for default should be **DENIED**. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **December 7, 2007**, as noted in the caption.

DATED this 14 day of November, 2007.

/s/ J. Kelley Arnold  
J. Kelley Arnold  
United States Magistrate Judge